Supreme Court of the United States

OCTOBER TERM, 1952

No. 167

UNITED STATES OF AMERICA, *Appellant*,

v.

JOSEPH KAHRIGER, *Appellee*.

BRIEF OF AMICI CURIAE

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This brief is filed by counsel who represent eleven negro defendants, who were convicted in the United States District Court for the Middle District of North Carolina for failure to pay Wagering Taxes provided for under the WAGERING TAX ACT (26 U.S.C.A. 3285 et seq.).

Six of these defendants were sentenced to the federal penitentiary and five of them were fined.

These defendants' cases are now pending in the United States Court of Appeals for the Fourth Circuit, the hearing having been stayed until the determination by this Court of United States of America v. Kahringer.

Permission has been granted these defendants by this Court to file this brief.

STATEMENT OF QUESTIONS INVOLVED

(1) Disregarding the designation of the Act and viewing its substance and application, the Court will find the

Act is a penalty for violation of state law and, therefore, invalid as beyond the limit of federal powers to enact.

(2) A license denotes authorization; therefore, the attacks made upon a similar act in the License Tax Cases (5 Wall. 462, 18 L. Ed. 497), although rejected there, should, it is submitted, have been sustained.

(3) Sound public policy dictates that the processes of the court should not be employed to enforce the provisions of the Act, because the end sought to be attained thereby does not justify the reprehensible means.

(4) The Act is invalid because its inquisitorial provisions violate the Bill of Rights enumerated in the Unreasonable Search and Seizure Clause of the Fourth Amendment and the Self-Incrimination Clause of the Fifth Amendment.

Argument

(1) DISREGARDING THE DESIGNATION OF THE ACT AND VIEWING ITS SUBSTANCE AND APPLICATION, THE COURT WILL FIND THE ACT IS A PENALTY FOR VIOLATION OF STATE LAW AND, THEREFORE, INVALID AS BEYOND THE LIMIT OF FEDERAL POWERS TO ENACT.

The marked likeness between the measure (Rev. Act 1926, sec. 701), condemned by this Court in the case of *United States v. Constantine*, 296 U.S. 287, 80 L Ed. 233, 54 S. Ct. 233, and the one presented in this case (October 20, 1951, 65 Stat. 529, Int. Rev. Act 1951, sec. 471 (a), 26 U.S.C., secs. 3285-3298, inclusive) is made abundantly clear, in the able opinion of the Trial Judge. Viewing the substance and application of these acts, one is forced to the conclusion that both constitute a penalty for the violation of state law.

In the *Constantine* case, *supra*, heavily relied upon by the Trial Court, Mr. Justice Roberts, in his keen analysis of the statute there encountered as well as its application to the facts involved, leaves no uncertainty as to the position of the Court respecting the validity of the Act. We quote from the identical

passages from that case, as did the Trial Judge, as follows (296 U.S. at page 294):

> "In the acts which have carried the provision, the item is variously denominated an occupation tax, an excise tax, and a special tax. If in reality a penalty it cannot be converted into a tax by so naming it, and we must ascribe to it the character disclosed by its purpose and operation, regardless of name. Disregarding the designation of the exaction, and viewing its substance and application, we hold that it is a penalty for the violation of State law, and as such beyond the limits of federal power.****
>
> (page 295)
>
> "The condition of the imposition is the commission of a crime. This, together with the amount of the tax, is again significant of penal and prohibitory intent rather than the gathering of revenue. Where, in addition to the normal and ordinary tax fixed by law, an additional sum is to be collected by reason of conduct of the taxpayer violative of the law, and this additional sum is grossly disproportionate to the amount of the normal tax, the conclusion must be that the purpose is to impose a penalty as a deterrent and punishment of unlawful conduct.
>
> "We conclude that the indicia which the section exhibits of an intent to prohibit and to punish violations of State law as such are too strong to be disregarded, remove all semblance of a revenue act, and stamp the sum it exacts as a penalty. In this view the statute is a clear invasion of the police power, inherent in the States, reserved from the grant of powers to the federal government by the Constitution.
>
> "We think the suggestion has never been made—certainly never entertained by this Court—that the United States may impose cumulative penalties above and beyond those specified by State law for infraction of the State's criminal code by its own citizens. The affirmation of such a proposition would obliterate the distinction between the delegated powers of the federal government and those reserved to the States and to their citizens. The implications

from a decision sustaining such an imposition would be startling. The concession of such a power would open the door to unlimited regulation of matters of State concern by federal authority. The regulation of the conduct of its own citizens belongs to the State, not to the United States. The right to impose sanctions for violations of the State's laws inheres in the body of its citizens speaking through their representatives.***

(page 296)

"Reference was made in the argument to decisions of this Court holding that where the power to tax is conceded the motive for the exaction may not be questioned. These are without relevance to the present case. The point here is that the exaction is in no proper sense a tax but a penalty imposed in addition to any the State may decree for the violation of a State law. The cases cited dealt with taxes concededly within the realm of the federal power of taxation. They are not authority where, as in the present instance, under the guise of a taxing act the purpose is to usurp the police power of the State."

An analysis of the statute here involved (October 20, 1951, 65 Stat. 529, Int. Rev. Act. 1951, sec. 471(a), 26 U.S.C. secs. 3285-3298, inclusive) discloses even more clearly indicia of a penalty than appear in the *Constantine* case, *supra*. For here, in addition to exhorbitant penalties of not less than One Thousand Dollars ($1,000.00) for failure to pay taxes (sec. 3294), the applicant for registration, among other requirements, must give the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf, etc. (sec 3291). Moreover, as stated by the Court below: "Failure to give this information and to comply with the law in certain respects would subject the applicant to a fine of Ten Thousand Dollars ($10,000.00) and imprisonment of five (5) years." Therefore, taking into account that here, as in the *Constantine* case, the doing of the act for which the purported license tax was exacted, constituted an infraction of the state criminal law, the Court should have no difficulty in concluding that the principle so convincingly expounded in the

above-quoted excerpt from the opinion of Mr. Justice Roberts should, for all the more reason, invalidate the stature here, as it did in the *Constantine* case. Moreover, as observed in an excellent comment of the *Constantine* case, appearing in *84 U. of Pa. L.R. 663*, " . . . the Court's decision was in accord with the principle of the precedent *Child Labor Tax Case* [259 U.S. 20, 66 L. Ed. 817, 42 S. Ct. 449] and the subsequently decided *A.A.A.* case [United States v. Butler, 297 U.S. 1, 80 L. Ed. 477, 56 S. Ct. 312], that Congress may not by its tax-power, encroach upon the state police power."

In the *Child Labor Tax Case, supra*, the Court was confronted with the validity of the *Child Labor Tax Law* (Feb. 24, 1919, 40 Stat. at L. 1057, 1138, Chap. 18, Comp. St. 6336 7/8a, under title *"Tax on Employment of Child Labor,"* secs. 1200-1208, inclusive). This law undertook to impose a so-called tax of 10% upon an employer who during a portion of the taxable year knowingly employed a person within the age limits therein proscribed. With only one member of the Court dissenting, the Act was declared unconstitutional. Mr. Chief Justice Taft, in an opinion characterized by its strength and clearness, forcefully demonstrated that Congress under the guise of a taxing measure had in fact encroached upon the prerogative reserved to the states, in violation of the 10th Amendment to the Constitution of the United States. The opinion reflects that the Court is fully aware of the seriousness of the extraordinary duty of having to invalidate an act of Congress; at the same time the opinion reflects that such duty is not to be avoided, where as in that case, as in the instant case, the substance of the legislative enactment — as distinguished from its form—points unerringly to the conclusion that Congress has infringed upon the power of the several states.

The subsequent decision, one of far-reaching importance, adverted to in the law review comment *(84 U. of Pa. L.R. 663)*, *United States v. Butler*, 297 U.S 1, 80 L. Ed. 477, 56 S. Ct. 312, is also apposite to the question under discussion. In that case certain provisions of the *Agricultural Adjustment Act*, 1933, (Chap. 25, 48 Stat. ct. L. 31, title 7, U.S.C.A. sec. 601) were condemned as being in contravention of the powers reserved to the states. Once again under the guise of taxation,

Congress had transgressed upon matters of state concern. Heavy reliance was placed by Mr. Justice Roberts in that case on the decisions both of the *Child Labor Tax Case*, 259 U.S. 20, 66 L. Ed. 817, 42 S. Ct. 449 (*supra*) and of *United States v. Constantine*, 296 U.S. 287, 80 L. Ed. 233, 54 S. Ct. 233. A striking application of the principle involved in all of these cases, including the case at bar, was made by Mr. Justice Sutherland, in *United States v. La France*, 282 U.S. 568, 75 L. Ed. 551, 51 S. Ct. 278, as follows (282 U.S. at page 572):

> "No mere exercise of the art of lexicrography can alter the essential nature of one act or thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such. That the exaction was in question or not a true tax, but a penalty involving the idea of punishment for infraction of the law, is settled by Lepke v. Lesbren, 259 U.S. 557, 561, 66 L. ed. 1061, 1064, 1065, 42 S. Ct. 549."

Applied to the measure before the Court (October 20, 1951, 65 Stat. 529, Int. Rev. Act 1951, sec. 471 (a), 26 U.S.C. sec. 3285-3298, inclusive) the principle, so ably expounded in that case, conclusively establishes the invalidity of this Act. As in *United States v. La France*, 282 U.S. 568, 75, L. Ed. 65 Stat. 531, 551, 51 S. Ct. 278, the Act is designated a tax (*Wagering Taxes*, 26 U.S.C.A., sec. 3285, et seq.) And as in the *La France* case, in the subsequent provisions the labels "tax" and "taxes" are employed. Likewise, as in the *La France* case the "essential nature" of the Act is a penalty. This conclusion is inescapable, even from a cursory reading of the Wagering Tax Act. In addition to the indicia of a penalty, hereinabove indicated, the provision under "miscellaneous" (sec. 3297) with reference to applicability of federal and state laws manifests a desperate effort on the part of the draftsman to insulate the Act against an anticipated storm of attack based upon its distinct penal character.

Nor are such cases as *United States v. Doremus*, 249 U.S. 86, 63, L. Ed. 493, 39 S. Ct. 214, and *Sonzinsky v. United States*, 300 U.S. 506, 81 L. Ed. 772, 57 S. Ct. 554, in conflict with the position here taken. In those cases the tax laws involved were in truth and in fact revenue measures. And as such were recog-

nized by the Court. The opinions of the Court in each of those cases were lucid with regard to the power of Congress in the legitimate sphere of taxation and prohibited sphere of regulation of matters reserved to the states.

The decision in *United States v. Sanchez* 340 U.S. 42, 71 S. Ct. 108, 95 L. Ed. 47, presents, at first blush, a seemingly complete reversal of principles heretofore emphasized and applied by the Court, as in all of the cases hereinabove cited. Upon a closer inspection, however, it will be found that the *Marihuana Tax Act* (Int. Rev. Code sec. 2590 (a) (2)), there involved, while attended by some of the attributes of a penalty similar to the Act here in question, is distinguishable as its object is primarily to raise revenue. Explicit in this statement of the Court in that case is the unequivocal determination that the effect of the legislative enactment was a valid exercise of the taxing power—the regulatory provision being merely collateral (340 U.S. at page 45) :

> *"The tax in question is a legitimate exercise of the taxing power despite its collateral regulatory purpose and effect."* (italics supplied)

Hence another statement of the Court susceptible of a different interpretation, hereinafter alluded to, constitutes mere dictum. As the government prevailed in that case and inasmuch as there is some resemblance in the provisions of the Act there encountered with the one before the Court, we anticipate heavy reliance will be placed upon that decision by the government in the presentation of this case. Accordingly, we make a few additional observations concerning that decision.

The Act, as here, was declared invalid by the Trial Court, and, as here, the government appealed to this Court. On the appeal in that case, the respondent was not represented by counsel. The government apparently had no opposition. Inasmuch as the Act in the *Sanchez* case constituted a revenue measure, as above noted, the opinion of the Court stating "the revenue purpose of the tax may be secondary" is obviously dictum. Furthermore, as disclosed in an unusually penetrating analysis made of that decision in *36 Iowa L. R. 699*, this statement of the Court was a complete departure "from the limitation

always recognized, if not seriously adhered to" in cases of this nature.

And as further brought to light in the law review comment *(36 Iowa L. R. 699 at p. 700)*, the three cases cited by the Court in support of its hypothesis are inapposite thereto. The first of these cases, *Hampton & Co. v. United States*, 276 U.S. 394, 72 Ed. 624, 48 S. Ct. 348, concerned the Tariff Act of 1922 (19 U.S.C. sec. 154). Drawing upon the comment, we quote (p.700) :"...the case presented no serious constitutional issue as to the power of Congress to regulate the activity involved in view of the plenary power of Congress to regulate foreign commerce." The second case, *Sonzinsky v. U.S.*, 300 U.S. 506 81 L. Ed. 772, 57 S. Ct. 554, upheld the National Fire Arms Act of 1934 (Int. Rev. Code, sec. 1132), the Court finding, as above indicated, that the effect of the measure was a tax, not a regulation. In *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 78 L. Ed. 1109, 54 S. Ct. 599 the third case relied upon the Court in the *Sanchez* case, an excise tax of the state of Washington was sustained. Once more we resort to the law review comment (*36 Iowa L.R. 699 at p.700*) with reference to the disposition of the *Magnano* case: (p.700) : "...the Supreme Court emphasized that the measure was primarily for revenue despite the collateral regulatory purpose and effect."

Surely the assertion in that opinion amounted to no more than a casualty that occasionally befalls the most circumspect on the bench. In any event this Court has too often demonstrated its ability to extricate itself from the shackles of some ill-advised precedent or pronouncement—made under such conditions as were exhibited in the *Sanchez case*, where only one party to the controversy appeared before the Court—to be concerned with the rule there announced. Two cogent reasons suggest themselves why the Court should not adhere to such rule: (1) prior opinions of this Court establish the converse of such a rule; (2) sound reasoning supports the precedent. In addition to the cases hereinabove cited, we urge the Court to review the convincing opinion of the Court in *Carter v. Carter Coal Company*, 298 U.S. 238, 80 L. Ed. 1160, 56 S. Ct. 855. The law review comment (*36 Iowa L.R 699*) succinctly points out the manifest danger involved in adhering

to such rule (p.701): "Objectives heretofore thought to be beyond the Constitutional power to achieve may yield to adroit use of the plenary taxing power."

Another fundamental distinction between the *Marihuana Tax Act* and the *Wagering Tax Act* is that compliance with the former act does not in and of itself expose the tax-payer to the processes of the criminal court, either state or federal; while the compliance with the latter act automatically subjects the tax-payer to the processes of at least the state criminal court.

A didactic passage from the opinion of Mr. Justice Cardozo in *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 81 L. Ed. 1279, 57 S. Ct. 883, presents clearly the underlying distinction between the imposition of a valid tax, such as the Social Security Tax involved in that case and the imposition of an invalid tax as is here involved (301 U.S. at page 591):

> "It is one thing to impose a tax dependent upon the conduct of the taxpayers, or of the state in which they live, where the conduct to be stimulated or discouraged is insulated to the fiscal need subserved by the tax in its normal operation, or to any other and legitimately national. The Child Labor Tax Cases were decided in the belief that the statutes there condemned were exposed to that reproach. Cf. U.S. v. Constantine. It is quite another thing to say that a tax will be abated upon the doing of an act that will satisfy the fiscal need, the tax and the alternate being approximate equivalents."

Is it not obvious that the imposition of the purported tax before the Court is dependent upon the conduct of the tax-payer? Is it not obvious that the conduct sought to be discouraged (gambling) is unrelated to the fiscal need subserved by the tax in its normal operation? Is the end sought to be reached legitimately national?

It is observed that Mr. Justice Cardozo cited in support of his postulate *United States v. Constantine*, 296 U.S. 287, 80 L. Ed. 233, 54 S. Ct. 223, which was emphasized, as above indicated, by the Trial Judge in this case. By the same token, therefore, this Court, it is submitted, should have no hesitancy

in affirming the judgment of the lower court in this cause. Accordingly, it is only from a sense of duty to our clients, not to leave a stone unturned, do we seek the further indulgence of the Court in bringing forward other argument in support of the invalidity of the Act in question.

(2) A LICENSE DENOTES AUTHORIZATION; THEREFORE, THE ATTACKS MADE UPON A SIMILAR ACT IN THE LICENSE TAX CASES (5 WALL. 462, 18 L ED 497) ALTHOUGH REJECTED THERE, SHOULD, IT IS SUBMITTED, HAVE BEEN SUSTAINED.

In the *License Tax Cases, supra,* the principal argument advanced was that the granting of a license to carry on a particular business, a lottery, was a grant of authority to carry it on; that as Congress did not have the power thus to regulate the internal trade of the state, therefore, the authorization was void.

Mr. Chief Justice Chase, in addressing himself to the foregoing attack upon the validity of the Act in that case makes this astounding assertion (5 Wall. at page 470):

> "This series of propositions and the conclusions in which it terminates depends on the postulate that a license necessarily confers an authority to carry on a licensed business but do the licenses required by the Acts of Congress for selling liquor and lottery tickets confer any authority whatever?"

The word *license* is defined in the Century Dictionary (unabridged) as follows: "To grant authority to do an act which without such authority would be illegal or inadmissible; remove restrictions from by a grant of permission," etc. Consequently, it would seem that violence is done to the common acceptation of the word *license* by thus depriving the word of its denotation. Nor in making this observation are we losing sight of the fact that words, after all, are merely symbols of thought; that words must be construed in the light of their settings. Bearing this salutory principle in mind, however, we strenuously contend that there was no justification for attributing to the word *license* such a strange construction as was done in the *License Tax Case, supra.* Moreover, from the

above quoted portion from the opinion in that case the implication is apparent that, but for this deviation of the word *license* from its ordinary use, the arguments advanced by counsel attacking the validity of the act would have been considered meritorious. Accordingly, we incorporate here these able arguments.

We anticipate that the Court shares our view that Mr. Chief Justice Chase in many of his opinions has made substantial contributions to the development of the law, and will, therefore, understand that it was only after due consideration that we felt impelled to criticize his opinion in the *License Tax Cases, supra.*

Furthermore, we are constrained to believe that the Court will share our view with reference to the meaning and construction of the word *license* thereby converting the opinion in that case from one in support of the legislative enactment there and here involved to one in opposition therto. Specious reasoning, we submit, would be required to adopt any other course.

(3) SOUND PUBLIC POLICY DICTATES THAT THE PROCESSES OF THE COURT SHOULD NOT BE EMPLOYED TO ENFORCE THE PROVISION OF THE ACT, BECAUSE THE END SOUGHT TO BE ATTAINED THEREBY DOES NOT JUSTIFY THE REPREHENSIBLE MEANS.

Assuming, for the sake of discussion that the term *license* does not denote authorization, nevertheless, we respectfully contend that the processes of the Court should not be employed to enforce the provisions of the Act. To say that because the *license* does not denote authorization the measure is illegal and, therefore, the amounts prescribed are collectible, completely begs the question of public policy. Or to put it another way, the legality of the tax is not the criterion to determine whether or not public policy subscribes to the utilization of the processes of the court for the enforcement of the Act. Fallacious reasoning is necessary to obtain any other result. The regulation of gambling—the end sought to be attained—does not justify the reprehensible means sanctioned by the Act.

Mr. Justice Frankfurter, dissenting in the recent case *On Lee vs. U.S.*—U.S., 96, L. Ed. (adv.) #16, p. 770 at p. 776, 72 S. Ct. 967, at page 974: epitomizes the underlying principle advanced here by us in vigorous and unmistakable language as follows:

> "The law of this Court ought not to be open to the just charge of having been dictated by the 'odious doctrine', as Mr. Justice Brandeis called it, that the end justifies reprehensible means. To approve legally what we disapprove morally, on the ground of practical convenience, is to yield to a short-sighted view of practicality. It derives from a preoccupation with what is episodic and a disregard of long-run consequences. The method by which the state chiefly exerts an influence upon the conduct of its citizens, it was wisely said by Archbishop William Temple, is 'the moral qualities which it exhibits in its own conduct.'
>
> "Loose talk about war against crime too easily infuses the administration of justice with the psychology and morals of war. It is hardly conducive to the soundest employment of the judicial process. Nor are the needs of an effective penal code seen in the truest perspective by talk about a criminal prosecution's not being a game in which the Government loses because its officers have not played according to rule. Of course criminal prosecution is more than a game. But in any event it should not be deemed to be a dirty game in which 'the dirty business' of criminals is outwitted by the 'dirty business' of law officers. The contrast between morality professed by society and immorality practiced on its behalf makes for contempt of law. Respect for law cannot be turned off and on as though it were a hot-water faucet."

One illustration should suffice to make clear the applicability of the foregoing principle to the Act in question.

Surely it would not be seriously contended that the processes of the court could be successfully utilized to permit the loser of a gambling transaction to collect money or property delivered in payment of or on account of the transaction. 24 *Amer. Juris., Gaming and Prize Contests*, sec. 79, page 445;

Rest. Contracts sec 598; *Williston, Contracts* (rev. ed.) vol. 5, sec. 1630, et seq. The reason for the denial of such relief was stated by Lord Mansfield in *Holman v. Johnson,* Cowp., 341, 343, quoted in *Williston, supra,* section 1630, p.4561: The principle of public policy is this :*Ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act,' " etc. It is to be noted that the fundamental basis of the hypothesis is made to rest upon public policy—not illegality—illegality being merely a classification of a broader concept, public policy.

Does it comport with a sense of good morals to say that while the courts will not enforce the consideration paid in the gambling transaction that they will lend their aid to collect a purported license tax for which the licensee acquires no authorization? Or if any authorization is acquired, the licensee thereby subjects himself to the criminal processes of the state court? Would not a doctrine that would permit the use of a legal process to effect such a recovery be properly classified as an "odious" one? Is not the Act calculated to encourage crime, because the criminal law will be reluctantly enforced against gamblers who have acquired licenses? Is not the Act, therefore, against public policy "as tending to encourage crime and create disrespect for the criminal laws?" *Thompson v. Hall,* 104 W. Va. 76, 138 S. E. 579. Does not such an act offend "the community's sense of fair play and decency"?

Once more, we appeal to the sound judgement of a Court characterized by its dynamic approach to questions involving, as here, the liberty of the individual—a Court, which has on innumberable occasions sought to safe-guard the fundamental rights of the individuals even at the risk in so doing of a charge of being inconsistent with a former position. A graphic illustration of this forthright and fearless approach to questions concerning personal liberties is reflected in a few words from the dissent of Mr. Justice Douglas in *On Lee v. United States,*—U.S. 96, L. Ed. (adv.) 770, at page 778, S. Ct. 967, at page 976:

> "The Court held in Olmstead v. United States, 277 U.S. 438, 48 S. Ct. 514, 72 L. Ed. 944, over powerful dissents by

Mr. Justice Holmes, Mr. Justice Brandeis, Mr. Justice Butler, and Chief Justice Stone that wire tapping by federal officers was not a violation of the Fourth and Fifth Amendments****Fourteen years later* in *Goldman v. United States*, 316 U.S. 129, 62 S. Ct. 933, 86 L. Ed. 1322, *the issue was again presented to the Court. I joined in an opinion of the Court written by Mr. Justice Roberts which adhered to the Olmstead case, refusing to overrule it. * * I now more fully appreciate the vice of the practice spawned by Olmstead and Goldman. Reflection on them has brought new insight to me. I now feel that I was wrong in the Goldman case.*" (italics supplied).

As long as members of the Court are disposed to espouse the cause of justice in this exemplary manner, these amici curiae are confident that the Court will conscientiously apply itself to the task of making a careful examination of the *Wagering Tax Act* (65 Stat. 529) in order to determine whether or not its provisions are in contravention of public policy or of the Bill of Rights, hereinafter discussed, and in doing so will have no difficulty in sustaining the judgment of the Trial Judge.

(4) THE ACT IS INVALID BECAUSE ITS INQUISITORIAL PROVISIONS VIOLATE THE BILL OF RIGHTS ENUMERATED IN THE UNREASONABLE SEARCH AND SEIZURE CLAUSE OF THE FOURTH AMENDMENT AND THE SELF-INCRIMINATION CLAUSE OF THE FIFTH AMENDMENT.

Imperceptibly the shadowy line of demarcation between reasons advanced in support either of public policy or of the Bill of Rights disappears upon analysis. The same fundamental concepts of liberty are encountered from either approach. This postulate is conclusively demonstrated in cases discussed, herein above under public policy. In the interest of time, therefore, we merely incorporate by reference here argument and citation of authority presented there.

At the outset of a consideration of the question as to whether or not the Act violates the Bill of Rights, we emphatically assert that the Court is not called upon to determine or to speculate about the legislative intent in enacting the

measure. Irrespective of legislative intent, the practical operation of the Act results in arming the law enforcement officers of Pennsylvania and North Carolina, wherein the respondent and the amici curiae reside, respectively, with sufficient information to indict and convict them for violations of the criminal law. And such officers do in fact proceed to indict and convict on such information. This result inevitably follows; while the operation of the Act as a revenue measure is highly speculative.

It is a matter of common knowledge, and as reflected by numerous newspaper accounts, such as appeared in the issue of *The New York Times*, page 28, under date of August 2, 1952, the *Wagering Tax Act* as a means of collecting revenue has fallen far short of expectations and has utterly failed to curb gambling activities. The *Senate Crime Investigating Committee* opposed the passage of this Act (79 Congr. Record, part 9, p. 12231). In addition, it is a matter of common knowledge that the public looks upon the Act with disfavor because of its insidious operation by granting to one, for a consideration, the privilege of performing an act, while subjecting him to punishment for that performance. Such a course of conduct does violence to the public conscience. No tenuous dogma or theory based upon the distinction between jurisdictional spheres of the two sovereignties, federal and state, alters the position of the public about the matter. For a most instructive article roundly condemning the "two sovereignties" theory and disclosing the danger to our liberties in adhering to such a course, see J. A. C. Grant, *Self-Incrimination in the Modern American Law, Concurrent Federal and State Juridiction," 5 Temple L. Q. 395.* Numerous decisions, some of which are hereinafter referred to, are ably discussed in that article.

To permit the federal government thus to participate in the apprehension of state violators by this nefarious means undoubtedly brings both the federal and state governments into disrepute. This fact in and of itself should suffice to invalidate the Act as being in contravention of a sound public policy. But the Court is not relegated solely to a position of public policy in order to declare the Act invalid, because the Act obviously infringes upon the fundamental rights of those who comply with its terms. Both the Unreasonable Search

and Seizure Clause of the Fourth Amendment and the Self-Incrimination Clause of the Fifth Amendment condemn the Act.

In the celebrated case of *Boyd v. United States*, 116 U.S. 616, 29 L. Ed. 764, 6 S. Ct. 524, any doubt that existed theretofore as to the inter-dependence of the Search and Seizure Clause of the Fourth Amendment and the Self-Incrimination Clause of the Fifth Amendment was clearly dispelled. It is unnecessary to undertake to amplify upon the actual decision of that case or to cite or comment upon the vast number of subsequent decisions of this Court, affirming the principles so painstakingly and ably set forth therein, except that it might be helpful to advert briefly to one or two cases, notably *Weeks v. United States*, 232 U.S. 283, 58 L. Ed. 652, 35 S. Ct. 341, which case has also received the subsequent unequivocal approval of this Court, as reflected by numerous opinions.

Mr. Justice Bradley, after addressing himself to the historical background of the two clauses (Search and Seizure Clause of the Fourth Amendment and the Self-Incrmination Clause of the Fifth Amendment), and to the nefarious practices that the Bill of Rights were designed to guard against, placing heavy reliance upon and quoting extensively from Lord Camden's memorable discussion in *Entick v. Carrington*, 19 Howell St. Tr. 1029, has this to say 116 U.S. 616 at page 630:

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and rummaging of his drawers that constitute the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense; it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment."

This passage was quoted with approval and applied by Mr. Justice Day in the case of *Weeks v. United States, supra*, (232 U.S. 283 at page 291).

In *Jack v. Kansas*, 179 U.S. 372, 26 S. Ct. 73, 50 L. Ed. 234, the danger that testimony given under a Kansas statute (Kans. Laws 1897 c. 265, sec. 10) might incriminate the witness as a violator of federal law, and of the possible use of such testimony in the federal court was considered too unsubstantial and too remote to avail the witness of his privilege. While in the case at bar—irrespective of legislative intent—the inquisitorial provisions of the act result in coercing each applicant for license to divulge information that automatically subjects him to the criminal processes of the state court, and the state and federal authorities are actively prosecuting by virtue of these provisions. Upon such conviction, the applicant may be fined or imprisoned, or both, under state law. Can it be successfully maintained that such a practice does not amount to an *"invasion of his indefeasible right of personal security, personal liberty, and private property"*?

Ballmann v. Fagin, 200 U.S. 186, 26 Sup. Ct. 212, 50 L. Ed. 433, was decided after the *Jack* case. There the defendant was found guilty of contempt by the United States District Court for failing to obey an order of court directing him to produce a certain book before a grand jury. Overruling the order of contempt this Court, speaking through Mr. Justice Holmes, said (200 U.S. at p. 195):

> "The book very possibly may have disclosed dealings with the person or persons naturally suspected, and, especially in view of the charges that Ballmann kept a 'bucket shop,' dealings of a nature likely to lead to a charge that Ballmann was an abettor of the guilty man. If he was, he was guilty of a misdemeanor under Rev. Stat. sec. 5209, U.S. Comp. Stat. 1901, p. 3497, and no more bound to produce the book than to give testimony to the facts which it disclosed. *Boyd v. United States*, 116 U.S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; *Counselman v. Hitchcock*, 142 U.S. 547, 35 L ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195.

"Not impossibly Ballmann took this aspect of the matter for granted, as one which would be perceived by the court without his disagreeably emphasizing his own fears. But he did call attention to another, less likely to be known. As we have said, he set forth that there were many proceedings on foot against him as party to a 'bucket shop,' and so subject to the criminal law of the state in which the grand jury was sitting. According to United States v. *Saline Bank*, 1 Pet. 100, L. ed. 69, he was exonerated from disclosures which would have exposed him to the penalties of the state law. See *Jack v. Kansas* (decided this term), 199 U.S. 372, *ante*, 234, 26 Sup. Ct. Rep. 73."

Manifestly, if a person commanded by a federal court to give information is excused from so doing because of the *probability* of his being indicted in a state court; for all the more reason, a federal act demanding such information, which when issued *immediately* subjects him to the processes of the state criminal court, should be declared invalid.

Nor are we inadvertent of *Feldman v. United States*, 322 U.S. 487, 64 S. Ct. 1082, 88 L. Ed. 1408, holding that testimony obtained under a state immunity statute is admissible in a federal prosecution. To begin with that case was decided by a bare majority of the Court. Two justices took no part in the consideration of the case and two justices concurred in a vigorous dissenting opinion filed by a third justice. Accordingly, the case as a precedent is not in a strong position. Especially is this true when considered in the light of former decisions of the Court, analyzed in the carefully prepared article by J. A. C. Grant, *5 Temple L. Q. 395, supra*, and in a note, *"Admissibility in Federal Courts of Testimony Obtained Under State Immunity Statutes, 39 Ill. L. Rev. 184.*

Furthermore, the *Feldman* case is distinguishable from the instant case. The government in that case did not participate as it does here in an inquisition. There was no ear-mark of entrapment involved in the *Feldman* case. It is not a rash assumption that the state court when it required Feldman to testify in the proceedings did not anticipate that the government would subsequently take advantage of the situation by utilizing his testimony for the purpose of conviction. Precedent

clearly supported such an assumption. See cases cited in *5 Temple L. Q. 395, supra.* Moreover it has been suggested that the *Feldman* case could have been disposed of on the basis of a federal rule of evidence, without reference to the Bill of Rights. VIII, *Wigmore, Evidence* (3rd ed), sec. 2258, 1951, Supplement, at page 87. As indicated in the Supplement, this observation was an assimilation of the *Feldman* case to the theory advanced in the parent treatise.

Adverting to the inquisitorial provisions of the *Wagering Tax Act,* (26 U.S. C. Sec. 3291) we urge the Court to re-read with care the illuminating article by Honorable Edmund M. Morgan, *"The Privilege Against Self-Incrimination,"* 34 Minn. Law. Rev. 1. The historical back ground, therein so painstakingly narrated, irrefutably discloses that it was the design, intent, and purpose of the founding fathers in the Bill of Rights to protect us from just such legislation as is exemplified by this Act. The Unreasonable Search and Seizure Clause of the Bill of Rights is ably treated in 25 *Indiana L. Journal* 259, *"Freedom from Unreasonable Search and Seizure—A Second Class Constitutional Right?"* by Chas. A. Reynard.

As revealed by the cases presented in these articles, there exists some divergency of views among the members of the Court, as well as among the authorities, with regard to theories of constitutional law. Nevertheless, under any theory that may be advocated, the sagacious utterence of Mr. Chief Justice Marshall in *McCulloch v. Maryland,* 4 Wheat. 316, 407, 4 L. ed. 579, 601:

> *"We must never forget that it is a constitution that we are expounding."* (italics supplied)

will be found of immeasurable value in solving the particular constitutional question presented—especially in such a case as this one involving the protection of human liberties from inquisitorial methods, comparable with those eminating from the Court of Star Chamber.

In conclusion, we call to our aid the salutory pronouncement found in the last paragraph of the article, in 25 *Indiana Law Journal* 260 at page 313:

> "It is to be acknowledged, of course, that in its handling

of these cases the Court is confronted with the competing demands of two policies, extremely difficult if, indeed, possible to reconcile. On the one hand there is the interest in privacy which history tells us was the principal concern of the Amendment's framers. On the other is society's interest in the suppression of crime—an interest which is obtaining its fair share of public concern as measured by today's headlines. But, 'any community must choose between the impairment of its power to punish crime and such evils as arise from its uncontrolled prosecution,' in other words, 'we must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose.' In the proposal and adoption of the Fourth Amendment, that choice was made for us, and if it is found that it has been a poor one, we should resort to constitutional means to correct it."

We earnestly pray the Court, therefore, in its consideration of this case to bear in mind that by the adoption of the Fourth and the Fifth Amendments the choice between expediency and the protection of private rights was made by the framers of the Constitution. And if such choice has been found to be "a poor one," constitutional means should be resorted to for correction, rather than judicial fiat.

Respectfully submitted,

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